

APPEAL NO. 040261
FILED MARCH 25, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 5, 2004. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, "or at any time pertinent to this claim"; that the claimant failed to timely notify her employer of her injury pursuant to Section 409.001; that because the "Claimant did not sustain an injury, compensable or otherwise, Claimant did not have disability"; and that the respondent (self-insured) has not waived the right to contest compensability pursuant to Sections 409.021 and 409.022.

The claimant appeals all the determinations, emphasizing the "[Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002)] 'Downs' Waiver" determination and requesting reversal of the hearing officer's decision. The self-insured responds, urging affirmance.

DECISION

Reversed and rendered in part, and reversed and remanded in part.

This is an injury, timely notice to the employer, disability and carrier (or self-insured in this case) waiver case with the controlling issue being whether there was a carrier waiver pursuant to the Texas Supreme Court interpretation of Sections 409.021 and 409.022 in Downs. In Downs the Texas Supreme Court determined that under Sections 409.021 and 409.022 a carrier that fails to begin payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the employee of its refusal to pay within seven days after it receives written notice of an injury has not met the statutory requisite to later contest compensability. The claimant claimed that she sustained a work-related low back injury on _____. It is relatively undisputed that the self-insured received first written notice of the claimed injury on August 20, 2003, and did not file its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing compensability until August 28, 2003. The hearing officer made an unappealed determination that the self-insured did not timely notify the Commission and the claimant in writing of its refusal to pay. The self-insured asserts that Downs does not apply to this case, asserting that the claimant sustained no injury at all, and the self-insured's failure to contest compensability cannot create an injury as a matter of law. The self-insured's appeal cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex.App.-Tyler 1998, no pet.), in support of its position.

In Williamson, the court held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a

matter of law.” The Appeals Panel has previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where there is an injury which was determined by the hearing officer not to be causally related to the claimant’s employment. Texas Workers’ Compensation Commission Appeal No. 020941, decided June 6, 2002. In Texas Workers Compensation Appeal No. 000604, decided May 10, 2000, the Appeals Panel stated:

We have interpreted Williamson to mean that a carrier's failure to timely dispute does not create an injury only when there is no injury. If the claimant has established a condition that meets the definition of injury under Section 401.011(26), it does not matter that the cause of the injury may be outside the course and scope of employment because causation is no longer in dispute when a TWCC-21 has not been timely and properly filed.

In the instant case the treating doctor’s initial report dated _____ (the date of injury), found “Myospasms” and diagnoses lumbar segmental dysfunction. A subsequent lumbosacral MRI performed on July 31, 2003, showed disc degeneration and narrowing at the L5-S1 level and a “small broad-based disc protrusion...which produces slight extradural flattening of the ventral aspect of the thecal sac.” There is no contrary medical evidence. We hold that this is sufficient evidence of an injury or injurious condition, to meet the definition of injury in Section 401.011(26) and, therefore, Williamson does not apply for the reasons stated. The hearing officer’s determination that the claimant did not sustain damage or harm to the physical structure of her body is against the great weight and preponderance of the evidence and we reverse that determination and render a new decision that the claimant did sustain damage or harm to the physical structure of her body and that Williamson is not applicable.

In that the self-insured did not timely contest compensability pursuant to the Supreme Court interpretation of Downs, we likewise reverse the hearing officer’s determination that the claimant did not sustain a compensable injury and render a new decision that the claimant sustained a compensable injury by operation of law.

The hearing officer also erred in determining that the self-insured is relieved of liability under Section 409.002 because the claimant failed to timely notify her employer of her injury under Section 409.001. In Texas Workers’ Compensation Commission Appeal No. 022027-s, decided September 30, 2002, the Appeals Panel held that, when a carrier loses its right to contest compensability by not complying with the requirements of Section 409.021(a), it loses its right to assert a defense under Section 409.002 based upon the claimant’s failure to give timely notice of injury to the employer.

The hearing officer also determined that because the claimant did not sustain an injury, “compensable or otherwise,” the claimant did not have disability. Having reversed the hearing officer’s determination that the claimant did not have an injury, and pursuant to Downs, the injury was compensable as a matter of law, the basis of the

hearing officer's determination of no disability is also reversed. However the hearing officer's discussion on the "alleged lifting restrictions" is unclear and therefore we remand the disability issue to the hearing officer for determinations regarding disability as defined in Section 401.011(16). We note that the record contains evidence that the claimant had been released to full duty from a prior injury in November 2000; the claimant's testimony regarding her ability to work (which the hearing officer can believe or disbelieve); off work slips dated June 27 and July 2, 2003, releasing the claimant to limited duty with a 20-pound lifting restriction; another off work slip dated July 16, 2003, releasing claimant to limited duty with a 30-pound lifting restriction; and an off work slip dated August 6, 2003, taking claimant off work. We also note that the self-insured's witnesses testified that the claimant's job description required an ability to lift "up to 37 pounds on a routine basis, and up to 65 pounds on an occasional basis." There was no medical evidence to the contrary.

The hearing officer's decision that the claimant did not sustain a compensable injury on _____; that the self-insured is relieved of liability under Section 409.002 because of the claimant's failure to timely notify the employer of her injury pursuant to Section 409.001; and that the self-insured has not waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021, because there was no injury on _____, or on any other time pertinent to this claim, are reversed. We render a decision that the claimant has a low back injury; that the self-insured did not meet the statutory requisite of Section 409.021(a) to later contest compensability; and that as a result of the self-insured's failure to meet the statutory requisite of Section 409.021(a) to later contest compensability, the claimant has a compensable injury and the self-insured is not relieved of liability under Section 409.002. The hearing officer's order that the self-insured is not liable for benefits is reversed. The self-insured is liable for workers' compensation benefits in accordance with this decision, the rules of the Commission, and the 1989 Act. The hearing officer's decision regarding disability is remanded to the hearing officer.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**ST
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge